



CALIFORNIA ASSOCIATION of SANITATION AGENCIES

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To: CASA Members
Other Interested Stakeholders

From: Greg Kester, Biosolids Program Manager

Subject: Recent Federal Court Decision in Georgia regarding biosolids

A significant decision was rendered on February 25, 2008 in the United States District Court for the Southern District of Georgia in *McElmurrays v. U.S. Department of Agriculture (USDA)*. This decision overturned earlier administrative determinations by USDA and awards a “prevented planting” subsidy to the McElmurrays due to a claim of soil contamination due to biosolids applications. Anti-biosolids activists, and personal injury lawyers, are using this case to bolster their claims that land application of biosolids is not safe. CASA and others who have investigated these allegations believe the data does not support the claim and that the judge incorrectly interpreted the evidence.

The City of Augusta land applied biosolids to the McElmurray farm from 1979 – 1990. It is acknowledged that this was not a model program and numerous management and recordkeeping errors were made. **However**, the compelling evidence in this case strongly supports the USDA position against a prevented planting subsidy and shows no evidence of soil contamination. Based on the administrative record and information from EPA, and others, CASA has joined NACWA, WEF, and other stakeholders in urging USDA, EPA, and DOJ to appeal this decision. An Associated Press article uncritically accepted the court’s view on this issue, so this case has garnered national negative attention, which if left unchallenged, can adversely affect the viability of land application recycling programs.

The following points attempt to offer perspective and insight into the case. CASA members, when confronted with statements that this federal court decision supports the claim that land application contaminates the soil, can vigorously refute that claim.

- This latest decision comes out of ten years of litigation by the McElmurrays, their neighbor farmers the Boyces, and their attorneys to secure a financial award based on their claims that their land was contaminated and related allegations. Numerous lawsuits related to this claim have been filed against the City of Augusta, the University of Georgia (UGA), and unfortunately, individuals within EPA and UGA. No judge or jury prior to this decision has made any finding of fact that the biosolids contaminated the land or killed cattle, as alleged. Augusta settled one of the lawsuits, and a state court jury awarded some damages against Augusta for breach of contract in one lawsuit without making any finding of contamination or harm to cattle.

- The land application at issue in these cases occurred from 1979 – 1990. Since all parties agree that there was poor recordkeeping by the City of Augusta which renders the data quality questionable, the best way to assess the situation is via soil sampling and testing of the cattle and their forage. The heart of the debate should be over the soil sampling results.
- Williams Environmental Services, Brown and Caldwell Environmental Engineering, and Auburn University, on behalf of the City of Augusta; and Newfields Inc. and others, on behalf of the McElmurrays, performed soil sampling on the McElmurray farm. The results of all data submitted were reviewed by Bob Brobst, USEPA Region 8 biosolids coordinator, who was deemed the most qualified at EPA to conduct the review.
- In a November 10, 2003 letter to Mr. Tommy Weldon, USDA's Agricultural Program Specialist, Mr. Brobst goes into great detail to explain the results of his review. In that review he discounts most of the data provided by the Plaintiffs for a variety of data quality reasons. That which he does accept from the plaintiffs is consistent with the defendant's findings and shows no contamination or problem. The Williams et al, data is deemed wholly credible by Mr. Brobst as meeting strict QA/QS requirements. A complete field by field analysis illustrates metal levels in the background range and shows no contamination.
- There is a dispute over which evidence and which expert is credible. While the lower courts and USDA determined that USEPA's review was credible, the latest court decision favored the Plaintiff's hired experts and did not address the significant data in the record disproving the allegations.
- The February court decision states that Mr. Brobst "...did not consider (or find any particular fault with) the information provided by the McElmurrays....". This is inaccurate. Mr. Brobst's November 10, 2003 letter to USDA plainly demonstrates the limitations on the Plaintiff's data and supports USDA's decision.
- The February decision also made several statements that simply contradict accepted biosolids research findings and biosolids management principles. These include:
 - Blame is assessed to the City of Augusta for recommending an elevation of pH in the soil. This was the correct advice for aluminum mitigation. Plaintiffs' claimed aluminum toxicity as reason for poor crop productivity in 1990. For aluminum to have phytotoxic effects the pH would need to be in the 3-4 range. This is a dangerously low pH which would yield poor crop production in any event.
 - Plaintiff's expert claims the top 8 inches of soil is least likely to retain metals and that metals would leach below the root zone. Numerous peer reviewed research studies demonstrate that there is long-term retention in the upper horizon and metals are not prone to leaching. The Plaintiff's expert has experience with Superfund sites which may explain his unfamiliarity, and incorrect assumptions, with biosolids research.
 - General claims are made that certain constituents such as antimony, arsenic, chlordane, selenium, and thallium exceeded "limits". It is unclear what limits

would have applied. None of these constituents were regulated under 40 CFR part 257. It is also unclear whether soil or source limits were supposedly exceeded.

- Assertions are made that soil is “contaminated”, but no standard or regulation is cited to support those claims.
- A claim is made that sewage sludge had a PCB concentration of 5000 ppm! This should have been immediately flagged as an outlier and further reviewed by the lab. Presumably it is an analytical error or a unit conversion problem. Levels such as this would be exceedingly suspect. If the Court believed this result it would seem logical to have informed the Toxic Substance Control Act branch of EPA, under whose purview this would fall.
- In the soil analytical results submitted on behalf of the McElmurray’s, six different analytical methods were utilized. This made comparison of results impossible. It should be noted however that a number of samples were analyzed using ASA Total rather than EPA Method 3050. The ASA method destroys all silica and soil matter and measures total metals, including those that under natural conditions would be permanently bound in the soil matrix. Method 3050 is the EPA approved method for biosolids because it is not artificially destructive and only measures the maximum bio-available metal.
- Former USEPA Assistant Administrator for Water Tracy Mehan provided an eloquent description of the agency’s supportive views regarding biosolids application in a December 24, 2003 letter denying a request to impose a moratorium on the practice. In that letter this and a similar other Georgia case were referenced and repudiated. The Court dismisses that letter as irrelevant because it did not directly speak to this case. The basis of the Mr. Mehan’s response included many research products including the expert opinion of his staff who had previously investigated these claims.
- The opinion recycles certain old allegations that EPA repressed or took improper punitive actions regarding Agency personnel. EPA and the biosolids community at large has rejected these allegations and numerous other tribunals have credited the efforts expended in developing the part 503 program. It is not clear that USDA or EPA were given an opportunity to defend against these claims before the court made it a part of its opinion.

Please feel free to contact me for any further information or additional information on this issue.